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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                  0912139 B.C. LTD, et al.,

CASE NO. C18-1464JLR

11                  Plaintiffs,

CLAIM CONSTRUCTION  
12                  v.  
13                  RAMPION USA INC., et al.,  
14                  Defendants.

ORDER

15                   **I. INTRODUCTION**

16        This is a claim construction order in a patent infringement case involving two  
17 related patents: U.S. Patent No. 9,687,030 (“the ’030 Patent”) and U.S. Patent No.  
18 10,034,496 (“the ’496 Patent”) (collectively, “the Patents”). Plaintiffs 0912139 B.C. Ltd.  
19 (“B.C. Ltd.”) and Pakage Apparel Inc. (d/b/a BN3TH) (“Pakage”) (collectively,  
20 “Plaintiffs”) allege that Defendants Rampion USA Inc. and Rampion Enterprises Ltd.  
21 (collectively, “Defendants”) have infringed the Patents. (Compl. (Dkt. # 1) ¶¶ 32-61.)  
22 The parties dispute the construction of 10 claim terms. (See Jt. Cl. Chart (Dkt. # 47-1) at

1 1-94.) The court has reviewed the parties' joint prehearing statement and claim  
2 construction chart (Jt. Stmt. (Dkt. # 47); Jt. Cl. Chart), their claim construction briefs (Pl.  
3 Br. (Dkt. # 49); Def. Br. (Dkt. # 48); Pl. Resp. (Dkt. # 51); Def. Resp. (Dkt. # 50)), the  
4 materials filed in support of the claim construction briefs, the relevant portions of the  
5 record, and the applicable law. The court also heard from counsel at a *Markman* hearing<sup>1</sup>  
6 on July 12, 2019. (7/12/19 Min. Entry (Dkt. # 52); *see also* Tr. (Dkt. # 56).) Being fully  
7 advised, the court construes the disputed terms as set forth below.

## II. BACKGROUND

9 The Patents are directed to an undergarment for men that “include[s] [a] pouch to  
10 receive the wearer’s genitalia” (“the Invention”). (See Compl. ¶ 20, Ex. 4 (“’030 Patent”)  
11 at 2:29-30; *see also id.* ¶ 19, Ex. 3 (“’496 Patent”) at 2:27-29.) The Invention comprises  
12 “a body including a front portion and having leg openings for a wearer’s legs,” as well as  
13 a “stretch panel attached to the body inside the front portion.” (See ’030 Patent at  
14 8:17-18, 23-24; ’496 Patent at 8:14-15, 20-21.) The Invention also claims a “crotch  
15 panel” between the leg openings. (’030 Patent at 19-20; ’496 Patent at 15-16.) The  
16 stretch panel, which is “resiliently elastic,” is smaller than the front portion. (’030 Patent  
17 at 8:25-42; ’496 Patent at 8:31-38.) Accordingly, the stretch panel works to “gather[]”  
18 the front portion “from side-to-side and top-to-bottom,” creating “a three-dimensional  
19 pouch.” (’030 Patent at 8:42-44; ’496 Patent at 8:38-40.) The wearer of the

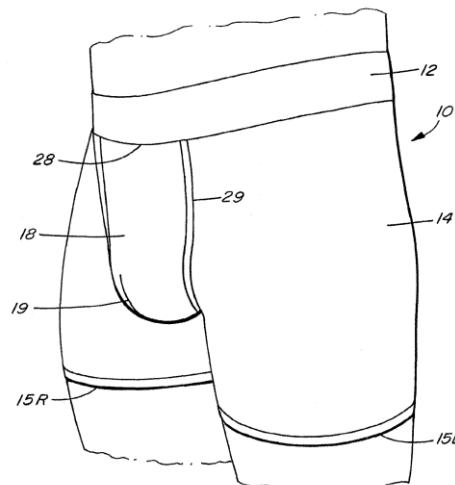
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<sup>1</sup> *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

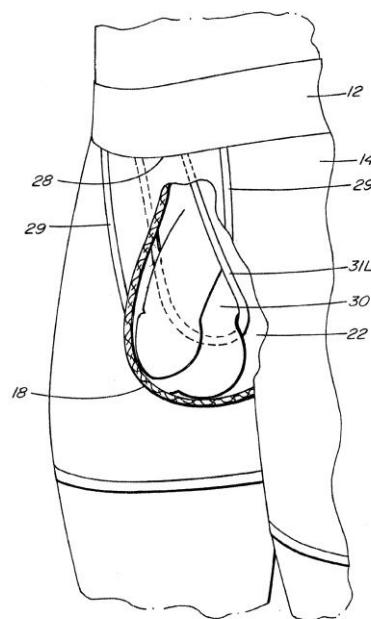
1 undergarment inserts his genitals through an opening in the stretch panel, and the pouch  
2 supports the genitals. ('030 Patent at 8:31, 45-47; '496 Patent at 8:27-28, 40-44.)

3 Figures 1 and 6, which appear in both Patents, illustrate a preferred embodiment.

4 The drawings show the garment's waistband [12], body [14], front portion [18], stretch  
5 panel [22], and the opening in the stretch panel [30].



13 FIG. 1



21 FIG. 6

22 ('030 Patents, Figs. 1, 6; '496 Patent, Figs. 1, 6.)

1       The '496 Patent is a continuation of the '030 Patent (*see* '496 Patent at 1:6-11),  
2 and the Patents share a substantially identical specification (*compare* '030 Patent, *with*  
3 '496 Patent). The primary difference between the Patents concerns the locations where  
4 the stretch panel attaches to the front portion of the garment's body. (*See* Pl. Br. at 3-4.)  
5 Claim 1 of the '030 Patent discloses a stretch panel with a top edge attached to the front  
6 portion at the "waistband seam" and a bottom edge attached to the front portion at the  
7 "first seam"—that is, the seam where the crotch panel meets the front portion. ('030  
8 Patent at 8:15-17, 23-27.) In contrast, claim 1 of the '496 Patent discloses a stretch panel  
9 with a top edge attached to the front portion at a "top location," rather than the waistband  
10 seam, and a bottom edge attached to the front portion at a "bottom location," rather than  
11 the first seam. ('496 Patent at 8:20-24.)

12       The parties dispute the meaning of 10 claim terms:<sup>2</sup> (1) "front portion"; (2)  
13 "stretch panel"; (3) "crotch panel"; (4) "top location"; (5) "bottom location"; (6)  
14 "substantially continuously along either side of the front portion"; (7) "gathered from  
15 side-to-side and top-to-bottom by the stretch panel"; (8) "asymmetrical stretch  
16 characteristics"; (9) "rectangular"; and (10) "a dart seam stitched along a bottom portion  
17 of the pouch." (*See generally* Jt. Cl. Chart.)

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21       <sup>2</sup> In their claim construction chart, the parties identified two additional disputed terms.  
22 (*See* Jt. Cl. Chart at 86-94; *see also* Jt. Stmt. at 5 n.4.) At the *Markman* hearing, however, the  
parties agreed with the court's inclination to refrain from construing the additional terms,  
pending construction of the remaining terms. (Tr. at 65:21-66:8.)

### III. DISCUSSION

### **A. Law on Claim Construction**

The court is solely responsible for construing patent claims. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). The court construes claims as a matter of law, although the court may make subsidiary factual findings regarding extrinsic evidence. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, --- U.S. ---, 135 S. Ct. 831, 836-38, 840-42 (2015). In practice, executing the *Markman* mandate means following rules that rank the importance of various sources of evidence that disclose the “true” meaning of claim terms.

The Federal Circuit summarized its view of proper claim construction in *Phillips v. AWH Corporation*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). Intrinsic evidence, which includes the patent and its prosecution history, is the primary source from which to derive a claim's meaning.<sup>3</sup> *Id.* at 1314. The court's task is to determine the "ordinary and customary meaning" of the terms of a claim in the eyes of a person of ordinary skill in the art on the filing date of the patent. *Id.* at 1313 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). In its review of intrinsic

<sup>3</sup> A patent includes three parts: (1) a “written description,” which consists of an often lengthy exposition of the background of the invention, at least one embodiment of the invention, and other written material that assists in understanding how to practice the invention; (2) in most cases, a set of drawings that illustrates portions of the written description; and (3) the claims, which delimit the scope of the invention. *Gen. Foods Corp. v. Studiengesellschaft Kohle mbH*, 972 F.2d 1272, 1274 (Fed. Cir. 1992). Together, these three components make up the patent’s “specification.” *Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1384 (Fed. Cir. 1999); 35 U.S.C. § 112. Although 35 U.S.C. § 112 refers to the claims as part of the specification, many courts and practitioners use the term “specification” to refer to all portions of a patent except the claims. See 35 U.S.C. § 112(b).

1 evidence, the court should begin with the language of both the asserted claim and other  
2 claims in the patent. *Phillips*, 415 F.3d at 1314; *see also Innova/Pure Water, Inc. v.*  
3 *Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004) (“[C]laim  
4 construction analysis must begin and remain centered on the claim language itself.”).

5 The court must read claim language in light of the remainder of the patent’s  
6 specification. *Phillips*, 415 F.3d at 1316 (explaining that “the specification necessarily  
7 informs the proper construction of the claims”). The specification acts as a  
8 “concordance” for claim terms and is thus the best source beyond the claim language for  
9 understanding those terms. *Id.* at 1315. The inventor is free to use the specification to  
10 define claim terms as he or she wishes, and the court must defer to the inventor’s  
11 definitions. *Id.* at 1316 (“[T]he inventor’s lexicography governs.”). The court should  
12 “rely heavily” on the specification in interpreting claim terms. *Id.* at 1317. The court  
13 should not, however, commit the “cardinal sin” of claim construction—impermissibly  
14 reading limitations from the specification into the claims. *Id.* at 1320 (citing *SciMed Life*  
15 *Sys. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1340 (Fed. Cir. 2001)).  
16 Although a court should limit the meaning of a claim where the “specification makes  
17 clear at various points that the claimed invention is narrower than the claim language  
18 might imply,” the court must not read particular embodiments and examples appearing in  
19 the specification into the claims unless the specification requires it. *Alloc, Inc. v. Int’l*  
20 *Trade Comm’n*, 342 F.3d 1361, 1370 (Fed. Cir. 2003); *Constant v. Advanced*  
21 *Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir. 1988). Additionally, although  
22 figures illustrating the invention may be used in construing claims, “the mere fact that the

1 patent drawings depict a particular embodiment of the patent does not operate to limit the  
2 claims to that specific configuration.” *Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 318  
3 F.3d 1143, 1148 (Fed. Cir. 2003).

4 The Federal Circuit has continued to emphasize the importance of reading the  
5 claims in the context of the specification and prosecution history.<sup>4</sup> *Laryngeal Mask Co.*  
6 *Ltd. v. Ambu*, 618 F.3d 1367, 1370 (Fed. Cir. 2010) (“The words of a claim are generally  
7 given their ordinary and customary meaning as understood by a person of ordinary skill  
8 in the art in question at the time of the invention when read in the context of the  
9 specification and prosecution history.”). Although the patent’s prosecution history is also  
10 intrinsic evidence, it is generally “less useful for claim construction purposes” than the  
11 specification. *Phillips*, 415 F.3d at 1317.

12 Finally, the court can consider extrinsic evidence, “including expert and inventor  
13 testimony, dictionaries, and learned treatises.” *Id.* (quoting *Markman*, 52 F.3d at 980)  
14 (internal quotation marks omitted). For a variety of reasons, extrinsic evidence is usually  
15 “less reliable than the patent and its prosecution history” as a source for claim  
16 interpretation. *Id.* at 1318. The court need not admit extrinsic evidence but may do so at  
17 its discretion. *Id.* at 1319.

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21           <sup>4</sup> The prosecution history exists independently of the patent. It consists of the inventor’s  
22 application to the United States Patent and Trademark Office (“PTO”) and all correspondence  
between the PTO and the inventor documenting the invention’s progress from patent application  
to issued patent. *Vitronics*, 90 F.3d at 1582.

1      **B. Disputed Terms**

2      1. front portion

3            The claim term “front portion” appears in claims 1, 5, 9, and 11 of the ’030 Patent  
4 and claims 1, 5, 9, 11, and 12 of the ’496 Patent. (’030 Patent at 8:18, 21, 24, 29-30, 39,  
5 41-42, 45, 58; *id.* at 9:1-2, 13; ’496 Patent at 8:14, 17, 20-21, 26-27, 35, 37-38, 41, 55-56,  
6 66-67; *id.* at 9:12, 15-16.) Illustratively, claim 1 of the ’030 Patent recites: “[a] male  
7 garment comprising: a body including a front portion and having leg openings for the  
8 wearer’s legs, the body including a crotch panel extending between the leg openings and  
9 joined to the front portion along a first seam.” (’030 Patent at 8:17-21; *see also* ’496  
10 Patent at 8:13-17.)

11            The parties propose the following constructions of the claim term “front portion”:

12            **Plaintiffs’ Proposed Construction:** “region of the garment’s body that is

13 situated in front of the wearer when the garment is worn and to which the stretch panel is  
14 attached to form a concave space between the front portion and the stretch panel capable  
15 of receiving the wearer’s genitals.” (Pl. Br. at 4.)

16            **Defendants’ Proposed Construction:** “the outermost layer of fabric of the body

17 of the male garment bounded by the side seams, waistband seam, and first seam.” (Def.  
18 Br. at 2.)

19            The parties agree that the front portion is part of the garment’s body and is situated

20 in front of the wearer when the Invention is worn. (*See* Pl. Br. at 4; Def. Br. at 2.)

21 However, the parties dispute two issues concerning the front portion: (1) whether the

22 front portion consists only of the Invention’s outermost layer of fabric, and (2) whether

1 the front portion is bounded laterally by the side seams and longitudinally by the first  
2 seam and the waistband seam. (*See* Pl. Resp. at 2-6; Def. Resp. at 1-7.) The court  
3 addresses these issues in turn.

4 Defendants argue that the front portion necessarily consists of the “the outermost  
5 layer of the undergarment’s body.” (Def. Br. at 2 (emphasis omitted).) As Defendants  
6 acknowledge, the words “outermost” and “layer” do not appear in the claim language or  
7 the specification. (*See* Tr. at 10:14-11:8; *see generally* ’030 Patent; ’496 Patent.)  
8 Defendants premise their proposed construction on the drawings in the specification and  
9 an episode of prosecution history. (*See* Def. Br. at 2-4.)

10 As to the drawings, Defendants argue that Figures 5 through 7, which appear in  
11 both Patents, “depict the front panel no differently than the rest of the undergarment’s  
12 body—as a single sheet of fabric . . .” (*Id.* at 2-3; *see also* ’030 Patent at Figs. 5-7; ’496  
13 Patent at Figs. 5-7.) That assertion is speculative. The court finds it impossible to  
14 determine whether the drawings depict the front portion as having one layer or multiple  
15 layers of fabric. (*See* ’030 Patent at Figs. 5-7; ’496 Patent at Figs. 5-7.) In any event, the  
16 drawings merely illustrate a preferred embodiment. (*See* ’030 Patent at 2:32-33 (noting  
17 that the Figures depict “undershorts . . . according to an example embodiment”).) Even  
18 assuming the drawings show the front portion as consisting of a single layer of fabric, the  
19 court would contravene a fundamental principle of claim construction were it to import  
20 that limitation into its construction of “front portion.” *See Philips*, 415 F.3d at 1320  
21 (explaining that the court must refrain from reading into the claim limitations drawn from  
22 an embodiment).

1 Defendants' reliance on the prosecution history is also unavailing. During the  
2 prosecution of the application that issued as the '030 Patent, the Patent and Trademark  
3 Office ("PTO") examiner suggested that the applicant "possibly include language that  
4 defined the seam structure of the stretch panel to the outer pouch such that there is no  
5 opening on the outermost layer." (Jt. Cl. Chart, Ex. 4 (Dkt. # 47-6) at 43.<sup>5</sup>) Defendants  
6 argue that the applicant "followed the examiner's instruction and added additional  
7 structural language defining the contours of the 'outer pouch' or 'outermost layer'—*i.e.*,  
8 the front portion . . ." (Def. Br. at 3.) Specifically, Defendants point to a submission to  
9 the PTO in which the patentee stated that, "as suggested by the Examiner, claim 1 now  
10 recites that side edges of the stretch panel are 'attached to the body at side seams  
11 extending substantially continuously along either side of the front portion from the first  
12 seam to the waistband.'" (*Id.* (quoting Jt. Cl. Chart, Ex. 4 at 30).) According to  
13 Defendants, because the applicant "never disputed the 'outermost layer' language"  
14 employed by the examiner, the court must incorporate that limitation into its construction  
15 of "front portion." (*See* Tr. at 12:15-20.)

16 Defendants fail to show that this episode of prosecution history is relevant to their  
17 argument that the front portion necessarily consists of the outermost layer of fabric. The  
18 language the applicant added to claim 1 appears to have been intended to distinguish the  
19 application that issued as the '030 Patent from prior art. (*See* Jt. Cl. Chart, Ex. 4 at 30.)  
20 Indeed, the applicant expressly explained that claim 1 was amended to recite that the side

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<sup>5</sup> When citing exhibits related to the Joint Claim Chart, the court cites the page number  
generated by the court's electronic filing system.

1 edges of the stretch panel are “attached to the body at side seams extending substantially  
2 continuously along either side of the front portion . . .” in an effort to “distinguish[] the  
3 Reis references [U.S. Patent No. 2,235,849] which require non-continuous side seams to  
4 provide a fly.” (*Id.*) It would be a leap too far to find that, in clarifying the attachment of  
5 the stretch panel to the front portion, the applicant implicitly adopted as a claim limitation  
6 the examiner’s reference to the “outermost layer” of the pouch. *See, e.g., Pitney Bowes,*  
7 *Inc. v. Hewlett-Packard Co.*, 69 F. Supp. 2d 309, 316 (D. Conn. 1998) (declining to  
8 define a limitation pursuant to a “single comment” the examiner made during the patent  
9 prosecution). The court thus rejects Defendants’ proposed “outermost layer” limitation  
10 as unfounded.<sup>6</sup>

11 The parties also dispute the lateral and longitudinal parameters of the garment’s  
12 front portion. Plaintiffs contend that Defendants’ proposal to define “front portion” as  
13 “bounded by the first seam, waistband seam, and side seams” is inconsistent with the  
14 claim language, specification, and “plain meaning” of the claim term, none of which limit  
15 “front portion” to the part of the garment between the four specific seams Defendants  
16 emphasize. (Pl. Br. at 8; *see also* Tr. at 9:7-15.) Defendants assert that Plaintiffs’  
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19 <sup>6</sup> Plaintiffs also argue that the prosecution history includes a “discussion . . . of a  
20 two-layer ‘front portion’” centered on Reis. (Pl. Br. at 6 (citing Jt. Cl. Chart at 2, Ex. 3 at  
21 63-64).) Defendants dispute Plaintiffs’ characterization of that part of the prosecution history.  
22 (Def. Resp. at 8-10.) Having rejected Defendants’ proposed “outermost layer” limitation, the  
court does not reach the parties’ disagreement on that point. Additionally, the court does not  
reach the parties’ arguments that their respective dictionary definitions of “front” weigh in favor  
or against limiting the front portion to the garment’s outermost layer. (See Pl. Br. at 7 n.3; Def.  
Br. at 5.)

1 proposed construction would sweep in any portion of the garment forward of the wearer  
2 and is thus overbroad. (Def. Br. at 3-4.)

3 To support their contention that the sides of the front portion are bounded by the  
4 side seams, Defendants rely primarily on claim language that describes the way the  
5 stretch panel attaches to the front portion. (*See* Def. Resp. at 5.) Claim 1 of both Patents  
6 discloses “a stretch panel . . . having . . . side edges attached to the body at side seams  
7 extending substantially continuously along either side of the front portion . . .” (’030  
8 Patent at 8:24-34; ’496 Patent at 8:21-27.) According to Defendants, in light of this  
9 claim language, the side edges of the stretch panel necessarily define the boundaries of  
10 the front portion: “If the front [portion] were to extend beyond the side seams, the side  
11 seams connecting the stretch panel would not ‘extend[] substantially continuously along  
12 either side of the front portion.’” (Def. Resp. at 5-6 (quoting ’030 Patent at 8:29-30)  
13 (emphasis omitted).)

14 The court is not convinced. Although the claim language specifies the lateral  
15 boundaries of the stretch panel, it does not specify the lateral boundaries of the front  
16 portion. Notably, the Patents refer to “the side edges” of the stretch panel but do not refer  
17 to the “side edges” of the front portion; rather, the Patents explain that the side edges of  
18 the stretch panel run along “either side of the front portion.” (*See* ’030 Patent at 8:28-30;  
19 ’496 Patent at 8:24-26.) Had the inventor wanted to specify that the front portion is  
20 bounded by the side seams, the inventor could have disclosed a stretch panel having side  
21 edges attached to the body along the side *edges* of the front potion. Cf. *Applied Med.*  
22 *Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n.3 (Fed. Cir. 2006) (“[T]he use

1 of two terms in a claim requires that they connote different meanings.”). The inventor  
2 did not so specify, and the court declines to adopt that unspoken limitation here.

3 Defendants also argue that the front portion must extend longitudinally from the  
4 first seam—the seam where the crotch panel meets the front portion—to the waistband  
5 seam. The limitation regarding the first seam is already expressed in the surrounding  
6 claim language and need not be reiterated in the construction of “front portion.” (See  
7 ’030 Patent at 8:18-20 (claiming “a crotch panel . . . joined to the front portion along a  
8 first seam”); ’496 Patent at 8:15-17); *see also CAAS Techs., LLC v. Envision Telephony,*  
9 *Inc.*, No. C15-0624JLR, 2016 WL 3199540, at \*10 (W.D. Wash. June 6, 2016) (rejecting  
10 a proposed construction because it “seeks to incorporate context that is expressly  
11 included in the claim’s language”). Moreover, although the drawings in the specification  
12 support the notion that the top of the front portion extends to the waistband seam, the  
13 claim language discloses no such limitation. (*See generally* ’030 Patent; ’496 Patent.)  
14 The court thus declines to construe “front portion” to extend longitudinally from the first  
15 seam to the waistband seam.

16 Defendants appear to contend that any construction of “front portion” that does not  
17 delineate the front portion’s “boundaries” as commensurate with the stretch panel is  
18 overbroad. (*See* Tr. at 14:4-10.) But, as discussed above, the court finds no grounds in  
19 the claim language that supports so precise a delineation of the front portion’s  
20 boundaries. Nor does the court find a basis in the claim language to otherwise delimit the  
21 length and breadth of the front portion.

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1 Having disposed of the two limitations integral to Defendants' construction of  
2 "front portion," the court finds that the claim term does not require construction. The  
3 court is not to make a construction that "contribute[s] nothing but meaningless verbiage  
4 to the definition of the claimed invention." *Harris Corp. v. IXYS Corp.*, 114 F.3d 1149,  
5 1152 (Fed. Cir. 1997). Claim construction is required only "when the meaning or scope  
6 of technical terms and words of art is unclear . . . and requires resolution in order to  
7 determine" the issue. *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed.  
8 Cir. 1997). Accordingly, "[i]f the claim language is clear on its face, then [the court's]  
9 consideration of the rest of the intrinsic evidence is restricted to determining if a  
10 deviation from the clear language of the claims is specified." *Interactive Gift Express,*  
11 *Inc. v. Compuserv Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001). Here, neither party has  
12 provided evidence that "front portion" has a special meaning in the art of the Patents.  
13 (See generally Pl. Br.; Def. Br.; Pl. Resp.; Def. Resp.) Nor does the court's review of the  
14 intrinsic evidence suggest that the claim term carries something other than its plain and  
15 ordinary meaning "in common parlance." See *Summit 6, LLC v. Samsung Elecs. Co.*, 802  
16 F.3d 1283, 1291 (Fed. Cir. 2015). The court thus declines to construe the claim term  
17 "front portion."

18       2. stretch panel

19       The claim term "stretch panel" appears in claims 1-5, 7, 9, 11, 13, and 14 of the  
20 '030 Patent and claims 1-5, 7, 9, 11, 13, and 14 of the '496 Patent. (See '030 Patent at  
21 8:23-24, 35, 37, 44-45, 48-50, 53-56, 60, 64-65; *id.* at 9:7, 12-13, 15, 20-22; '496 Patent

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1 at 8:20, 31, 33, 39-41, 44-46, 49-52, 57, 61-62; *id.* at 9:1, 4-5, 10-11, 13, 21, 22-23.)

2 Claim 1 of the '030 Patent claims:

3 a stretch panel attached to the body inside the front portion, the stretch panel  
4 comprising a sheet of elastically resilient four-way stretch material having a  
5 top edge attached to the body at the waistband seam, a bottom edge attached  
6 substantially continuously along either side of the front portion from the first  
seam to the waistband seam and an opening for receiving the wearer's  
genitals . . . .

7 ('030 Patent at 8:23-31.) Likewise, claim 1 of the '496 Patent discloses "a stretch panel  
8 attached to the body inside the front portion." ('496 Patent at 8:20-21.) In contrast to the  
9 '030 Patent, the '496 Patent claims a stretch panel with a top edge attached to the body  
10 "at a top location" and a bottom edge attached to the body "at a bottom location." (*Id.* at  
11 8:22-24.)

12 The parties propose the following constructions of the claim term "stretch panel":

13 **Plaintiffs' Proposed Construction:** "four-way stretch material separate from and  
14 joined to the inside of the garment's body that includes an opening for the wearer's  
15 genitals."

16 **Defendants' Proposed Construction:** Plain and ordinary meaning.

17 The parties dispute whether the court should construe this claim term. Defendants  
18 argue that, given the extensive claim language surrounding "stretch panel," a juror would  
19 readily understand the meaning of the claim term as would a person of ordinary skill in  
20 the art. (Def. Br. at 21-22.) Plaintiffs, in contrast, argue that Defendants' position that  
21 "stretch panel" need not be construed conceals a dispute about whether the stretch panel  
22 is "separate" from the garment's body. (Pl. Br. at 9.)

1 Plaintiffs' proposed construction would expressly specify that the stretch panel is  
2 "separate from and joined to the inside of the garment's body." (*See id.*) But there is no  
3 need to construe the claim to include that limitation. The surrounding claim language  
4 makes clear that the stretch panel is not part of the body of the garment but rather  
5 constitutes a panel of fabric that is itself attached to the front portion. Claim 1 of the  
6 Patents recites a "stretch panel comprising a sheet of . . . material having a top edge . . . ,  
7 a bottom edge . . . , [and] side edges . . ." ('030 Patent at 8:24-28; '496 Patent at  
8 8:21-25.) In other words, the stretch panel contains at least one discrete piece of material  
9 with four distinct edges. Additionally, claim 1 of the Patents explains that the stretch  
10 panel is "attached to the body inside the front portion." ('030 Patent at 8:23-24; '496  
11 Patent at 8:20-21.) Plaintiffs' integration of the limitation "separate from and joined to  
12 the inside of the garment's body" into the claim term is therefore redundant, and the court  
13 declines to adopt it. *See Symantec Corp. v. Acronis, Inc.*, No. C-11-5310 EMC, 2013 WL  
14 752472, at \*2 (N.D. Cal. Feb. 27, 2013) (rejecting a party's proposed construction as  
15 "redundant given the surrounding words of the claim"); *see also* CAAS, 2016 WL  
16 3199540, at \*10.

17 Plaintiffs' proposed construction articulates two additional limitations: (1) the  
18 stretch panel must "include[] an opening for the wearer's genitals," and (2) the stretch  
19 panel must comprise "four-way stretch material." (Pl. Br. at 8-10.) Again, these  
20 limitations appear in the surrounding claim language. First, claim 1 of each Patent  
21 provides that the stretch panel has "an opening for receiving a wearer's genitals." ('030  
22 Patent at 8:31; '496 Patent at 8:27-28.) Second, the Patents explain that the stretch panel

1 comprises “a sheet of elastically resilient four-way stretch material.” (’030 Patent at  
2 8:24-25; ’496 Patent at 8:21-22.) The court sees no need to construe “stretch panel” in a  
3 way that merely restates what the surrounding claim language clarifies.

4       The court agrees with Defendants that it need not construe the claim term “stretch  
5 panel.” Neither party suggests that the claim term carries anything other than its plain  
6 and ordinary meaning in the context of the asserted claims, and the intrinsic evidence is  
7 consistent with that meaning. *See Ethicon, Inc.*, 103 F.3d at 1568; *Samsung Elecs.*, 802  
8 F.3d at 1291. Moreover, the parties present no substantive disagreement about the scope  
9 of the claim term.<sup>7</sup> At the *Markman* hearing, counsel for Defendants agreed that “the  
10 stretch panel is a piece—or . . . pieces—of fabric distinct from the body of the garment.”  
11 (Tr. at 18:8-12.) Likewise, counsel for Plaintiffs suggested that affording “stretch panel”  
12 its plain and ordinary meaning “would be adequate,” as long as the court acknowledges  
13 that the stretch panel “has to be inside” the front portion. (*Id.* at 16:2-9.) As discussed  
14 above, the claim language is definitive on that point. The court thus declines to construe  
15 the claim term “stretch panel.”

16           3. crotch panel

17       The claim term “crotch panel” appears just once in the claims of each Patent.  
18 Claim 1 of each Patent discloses “a body including a front portion and having leg  
19 openings for a wearer’s legs, the body including a crotch panel extending between the leg

20 \_\_\_\_\_  
21           <sup>7</sup> Accordingly, this case is not like *O2 Micro International Ltd. v. Beyond Innovation*

Technology Co., where the Federal Circuit held that district courts must construe even common terms where there is “more than one ‘ordinary’ meaning,” or where the “‘ordinary’ meaning does not resolve the parties’ dispute.” 521 F.3d 1351, 1361 (Fed. Cir. 2008).

1    openings and joined to the front portion along a first seam.” (’030 Patent at 8:18-21;  
2    ’496 Patent at 8:14-17.)

3                 The parties propose the following constructions of the claim term “crotch panel”:

4                 **Plaintiffs’ Proposed Construction:** “fabric separate from and joined to both the  
5    front portion and the back side of the garment’s body in the region that is adjacent to the  
6    wearer’s crotch when the garment is worn.”

7                 **Defendants’ Proposed Construction:** Plain and ordinary meaning.

8                 Plaintiffs argue that Defendants’ reliance on a plain meaning construction of this  
9    claim term “obscures a dispute between the parties over whether the crotch panel is  
10   required to be a separate component of the body of the undergarment attached by seams  
11   to the front portion and the back side of the body.” (Pl. Br. at 17.) According to  
12   Plaintiffs, the court should resolve that dispute by construing “crotch panel” to expressly  
13   include four limitations: the crotch panel must be (1) a separate panel of fabric that is  
14   both (2) joined to the front portion and (3) joined to the “back side of the garment’s  
15   body,” and is (4) “adjacent to the wearer’s crotch when the garment is worn.” (*Id.* at  
16   17-18.) The court addresses these limitations in turn.

17                 Plaintiffs’ first proposed limitation—that the crotch panel be a “separate” panel of  
18   fabric—is redundant and uncontested. The word “panel” itself implies that the crotch  
19   panel is a separate fabric component. The specification is consistent with this  
20   understanding. For example, the embodiment illustrated in Figure 3 of both Patents  
21   “includes a crotch panel . . . joined by seams . . . to the front and back sides” of the body  
22   of the garment. (’030 Patent at 2:51-54; *id.* at Fig. 3; *see also* ’496 Patent at 2:48-51; *id.*

1 at Fig. 3.) Both the drawing and the specification’s written description indicate that the  
2 crotch panel is a swath of fabric separate from the other components of the garment’s  
3 body. (*See id.*) The parties appear to agree on this point. At the *Markman* hearing,  
4 counsel for Defendants did not dispute that the crotch panel is “a separate panel” of  
5 fabric. (Tr. at 24:17-18.) Because the crotch panel’s status as a distinct, separate  
6 component of the garment’s body is indicated by the plain meaning of the word “panel,”  
7 and because the parties do not dispute that understanding, the court finds it unnecessary  
8 to construe “crotch panel” as “fabric separate from . . . the garment’s body.” (*See* Pl. Br.  
9 at 17.)

10 Additionally, Plaintiffs argue that the court should define “crotch panel” to make  
11 clear that the crotch panel is “joined to . . . the front portion” of the garment’s body. (*Id.*)  
12 The surrounding claim language already expresses that limitation. Claim 1 of both  
13 Patents states that the “crotch panel . . . [is] joined to the front portion along a first seam.”  
14 (‘030 Patents at 8:19-21; ‘496 Patent at 8:15-17.) The court declines to construe “crotch  
15 panel” in a way that echoes what is unambiguously explained in the surrounding claim  
16 language. *See Symantec*, 2013 WL 752472, at \*2; CAAS, 2016 WL 3199540, at \*10.

17 Plaintiffs further urge the court to construe “crotch panel” as a panel of fabric  
18 “joined to . . . the back side of the garment’s body.” (Pl. Br. at 17.) As noted above, the  
19 preferred embodiment described in the specification features “a crotch panel joined by  
20 seams to the front and back sides of the body respectively.” (‘030 Patent at 2:51-54; ‘496  
21 Patent at 2:48-51.) But the words “back side[]” do not appear in the Patents’ claims.  
22 (*See generally* ‘030 Patent at 8:16-9:26; ‘496 Patent at 8:12-9:27.) In fact, the

1 specification indicates that the Invention need not have a back side, at least in the way  
2 Plaintiffs appear to use that phrase. Specifically, the specification provides that “[i]t is  
3 not mandatory that the garment include a body that covers a wearer’s buttocks” and cites  
4 “athletic supporters (jock straps)” as an example embodiment. (’030 Patent at 8:5-8; ’496  
5 Patent at 8:1-4.) Construing “crotch panel” to require that it be “joined to . . . the back  
6 side of the garment’s body” would exclude embodiments wherein the body does not  
7 cover the wearer’s buttocks. The court thus rejects that aspect of Plaintiffs’ proposed  
8 construction. *See Vitronics Corp.*, 90 F.3d at 1583 (noting that a construction of a claim  
9 in which an embodiment falls outside of the proposed construction “is rarely, if ever  
10 correct”).

11 Finally, Plaintiffs propose that the court construe “crotch panel” to indicate that  
12 the crotch panel is “adjacent to the wearer’s crotch when the garment is worn.” (Pl. Br. at  
13 17.) That limitation is implied by the plain and ordinary meaning of the word “crotch.”  
14 Given the meaning of “crotch” in common parlance, as well as the surrounding claim  
15 language, the court is persuaded that a lay jury would readily understand how the crotch  
16 panel is positioned with respect to the anatomy of the wearer. The court therefore  
17 declines to specify that the crotch panel is “adjacent to the wearer’s crotch when the  
18 garment is worn.”

19 In sum, the four limitations Plaintiffs propose are either redundant or erroneous.  
20 The court therefore considers Defendants’ proposal to afford “crotch panel” its plain and  
21 ordinary meaning. The court is mindful that it must construe even common terms where  
22 there is “more than one ‘ordinary’ meaning,” or where the “‘ordinary’ meaning does not

1 resolve the parties' dispute." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521  
2 F.3d 1351, 1361 (Fed. Cir. 2008). Neither circumstance is present here. Plaintiffs do not  
3 argue that the term "crotch panel" yields multiple ordinary meanings. (*See generally* Pl.  
4 Br.; Pl. Resp.) Nor do the parties present a dispute that the ordinary meaning of the claim  
5 term does not resolve. To the extent the parties disagree about whether the crotch panel  
6 is a "separate" panel of fabric, the ordinary meaning of "panel" resolves that issue in the  
7 affirmative. Furthermore, no party has indicated that a person of ordinary skill in the art  
8 would understand the term "crotch panel" to carry a meaning other than its plain and  
9 ordinary meaning, and the intrinsic evidence is consistent on that point. The court thus  
10 declines to construe the claim term "crotch panel."

11           4-5. top location and bottom location

12         The claim terms "top location" and "bottom location" appear in claims 1 and 5 of  
13 the '496 Patent and are best addressed together. (*See* '496 Patent at 8:23, 35-36, 53-54.)  
14 Unlike claim 1 of the '030 Patent, claim 1 of the '496 Patent does not require that the top  
15 and bottom edges of the stretch panel be attached to the garment's waistband seam and  
16 first seam, respectively; rather, the '496 Patent requires that the top edge of the stretch  
17 panel be "attached to the body at a top location" and the bottom edge of the stretch panel  
18 be "attached to the body at a bottom location." ('496 Patent at 8:23-24.) The terms "top  
19 location" and "bottom location" were added in a February 6, 2018, amendment to the  
20 claims of the application that issued as the '496 Patent, in response to a statutory double  
21 patenting rejection over the '030 Patent by the PTO. (*See* Jt. Cl. Chart, Ex. 6 (Dkt.  
22 # 47-8) ("2/6/18 Am.") at 35-38.)

1       The parties propose the following constructions of the claim terms “top location”  
2 and “bottom location”:

3       **Top location**

4       **Plaintiffs’ Proposed Construction:** Plain and ordinary meaning. Alternatively,  
5 “region where the top edge of the stretch panel is attached to the front portion of the body  
6 of the garment.”

7       **Defendants’ Proposed Construction:** “the seam connecting the body of the male  
8 garment and the stretch panel to the waistband.”

9       **Bottom location**

10       **Plaintiffs’ Proposed Construction:** Plain and ordinary meaning. Alternatively,  
11 “region where the bottom edge of the stretch panel is attached to the front portion of the  
12 body of the garment.”

13       **Defendants’ Proposed Construction:** “the seam connecting the crotch panel and  
14 the stretch panel to the front portion.”

15       The court begins by reviewing Defendants’ proposed constructions. Defendants  
16 insist that the court must define “top location” as the seam where the stretch panel is  
17 connected to the waistband—*i.e.*, the waistband seam. (Def. Br. at 5-9.) Likewise,  
18 Defendants contend that the court must define “bottom location” as the seam where the  
19 stretch panel and crotch panel are connected to the front portion—*i.e.*, the first seam. (*Id.*  
20 at 9-11.) Put otherwise, Defendants’ proposed constructions would leave no functional  
21 difference between the ’030 and ’496 Patents: both would claim a stretch panel whose  
22 top edge is attached to the waistband seam and whose bottom edge is attached to the first

1 seam. Defendants argue that this equivalence of claim meaning is warranted because the  
2 specification of the '496 Patent, which is essentially the same as that of the '030 Patent,  
3 does not support a broader construction of “top location” and “bottom location” than the  
4 '030 Patent. (*Id.* at 6-8; Def. Resp. at 12-13.) Defendants correctly note that the '496  
5 Patent's specification is substantially identical that of the '030 Patent and that the '496  
6 Patent's specification describes no embodiments in which the top and bottom edges of  
7 the stretch panel are attached anywhere but the waistband seam and first seam,  
8 respectively. (*See generally* '496 Patent.)

9 At the *Markman* hearing, Defendants argued that the Federal Circuit's decision in  
10 *Wang Laboratories, Inc. v. America Online, Inc.*, 197 F.3d 1377, 1382-83 (Fed. Cir.  
11 1999), compels the court to adopt their proposed constructions. (*See* Tr. at 30:16-31:4,  
12 32:23-6.) In *Wang*, the claim term at issue was “frame,” as applied to a computer  
13 application. 197 F.3d at 1381. Although the parties agreed in the abstract that the term  
14 could refer to both “character-based systems” and “bit-mapped display systems,” the  
15 specification of the patent-in-suit described only a character-based system. *Id.* at  
16 1381-82. The court concluded that the specification “would not be . . . understood by a  
17 person skilled in the field of the invention” to encompass bit-mapped display systems in  
18 the applicant's invention. *Id.* at 1382. In so finding, the court emphasized that “claims  
19 are not properly construed to have a meaning or scope that would lead to their invalidity  
20 for failure to satisfy the requirements of patentability,” and, “[a]lthough . . . a claim is not  
21 invalid simply because it embraces subject matter that is not specifically illustrated, in  
22 order to be covered by the claims[,] that subject matter must be sufficiently described as

1 the applicant's invention to meet the requirements of section 112." *Id.* The *Wang* court  
2 found that requirement was not satisfied as to systems other than character-based  
3 systems. *Id.*

4 Defendants argue that *Wang* requires the court to construe the claim terms "top  
5 location" and "bottom location" as synonymous with "waistband seam" and "first seam,"  
6 respectively, because the specification does not support broader readings of the terms.  
7 The court disagrees. The *Wang* court enumerated several considerations, including "the  
8 context of the specification" and the prosecution history, that bear on the breadth to  
9 which a claim term is entitled when the term purports to embrace subject matter not  
10 specifically illustrated in the specification. *Wang*, 197 F.3d at 1383. In that case, the  
11 court concluded that the prosecution history of the patent-in-suit showed that the  
12 inventors disclaimed a claim construction that would encompass bit-mapped systems,  
13 bolstering its conclusion that the claim term was limited to character-based systems. *Id.*  
14 at 1383-84. Here, the prosecution history weighs in the opposite direction: it shows that  
15 Plaintiffs intended to broaden the scope of the claim terms at issue to overcome the  
16 PTO's double-patenting rejection over the '030 Patent. (*See* 2/6/18 Am. at 35-38.)  
17 Factually, then, this case is distinct from *Wang*. (*See id.*); *see also Home Diagnostics,*  
18 *Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1357-58 (Fed. Cir. 2004) (explaining that, in  
19 changing the scope of claim terms across generations of a patent family, the patentee  
20 //  
21 //  
22 //

1 "purposely sought" a "broader" claim scope and was "entitled to the full scope of its  
2 claim language").<sup>8</sup>

3       The court further finds that Defendants' arguments concerning the proper  
4 construction of "top location" and "bottom location" boil down to invalidity contentions,  
5 not claim construction arguments. According to Defendants, "[i]f 'top location' means  
6 something different from 'waistband seam,' the amendment adding it to claims 1 and 5 of  
7 the '496 Patent would constitute 'new matter' introduced after the filing date of the  
8 original application," in violation of 35 U.S.C. § 132(a). (Def. Br. at 8); *see also* 35  
9 U.S.C. § 132(a) ("No amendment shall introduce new matter into the disclosure of the  
10 invention."). Relatedly, Defendants argue that any constructions of "top location" and  
11 "bottom location" that are broader than "waistband seam" and "first seam," respectively,

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15       <sup>8</sup> Defendants argue that *Home Diagnostics* is inapposite because, in that case, the court  
16 found that the specification made clear that the preferred embodiments described therein "d[id]  
17 not limit the broader claim language." 381 F.3d at 1357; (Def. Resp. at 12.) According to  
18 Defendants, "[u]nlike *Home Diagnostics*, the specification here does not teach at all that the top  
19 and bottom edges of the stretch panel would attach anywhere but the waistband seam and first  
20 seam, respectively." (Def. Resp. at 12-13.) The court acknowledges that language in the  
21 specification of the patent-at-issue in *Home Diagnostics* expressly alluded to additional methods  
22 of practicing the invention that were not encompassed by the preferred embodiments. 381 F.3d at  
1357. Plaintiffs have not pointed to similar language in the '496 Patent, apart from the  
Patent's statement that "the invention may be practiced without the[] particulars" illustrated in  
the specification. (*See generally* Pl. Br.; Pl. Resp.; '496 Patent at 2:21-22.) Nonetheless,  
Defendants have not persuaded the court that it is free to disregard *Home Diagnostic*'s central  
insight: "A patentee may claim an invention broadly and expect enforcement of the full scope of  
that language absent a clear disavowal or contrary definition in the specification." 381 F.3d at  
1357. Here, the absence of a clear disavowal of claim scope in the specification, and the  
prosecution history, weigh in favor of affording Plaintiffs the full scope of the '496 Patent's  
claim language. *See id.*

1 would fail for lack of written description under 35 U.S.C. § 112(1).<sup>9</sup> (Def. Br. at 8; Resp.  
2 at 12.) The addition of new matter to a patent application and compliance with the  
3 written description requirement are questions of fact. *See Commonwealth Sci. & Indus.*  
4 *Research Org. v. Buffalo Tech. (USA), Inc.*, 542 F.3d 1363, 1380 (Fed. Cir. 2008);  
5 *Invitrogen Corp. v. Contech Labs., Inc.*, 429 F.3d 1052, 1072 (Fed. Cir. 2005). Neither  
6 issue has been thoroughly addressed in the record before the court, and the court finds  
7 that these arguments are better suited for disposition after the claim construction phase,  
8 on a more complete record. *See, e.g., Reiffin v. Microsoft Corp.*, No. C-98-0266 VRW,  
9 2002 WL 31268220, at \*6-7 (N.D. Cal. April 30, 2002) (declining to consider the  
10 defendant’s “new matter” argument during claim construction because it would require  
11 the court to “disregard the language of the claims as issued”); *see also Phillips*, 415 F.3d  
12 at 1327 (“[W]e have certainly not endorsed a regime in which validity analysis is a  
13 regular component of claim construction.”).

14 Having disposed of Defendants’ proposal to construe “top location” and “bottom  
15 location” as synonymous with “waistband seam” and “first seam,” respectively, the court  
16 turns to the intrinsic evidence. The court finds that the claim terms “top location” and  
17 “bottom location” speak for themselves and are readily understood in the context of the  
18

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19         <sup>9</sup> Under the Leahy-Smith American Invents Act (“AIA”), Paragraphs 1 and 2 of 35  
20 U.S.C. § 112 were replaced with the newly designated §§ 112(a) and (b). *See* Pub. L. 112-29,  
21 § 4(c), 125 Stat. 285, 296; 35 U.S.C. §§ 112(a), (b). Because the ’496 Patent is a continuation of  
22 the ’030 Patent, which issued from an application filed before March 16, 2013, the pre-AIA 35  
U.S.C. § 112 applies. *See id.* § 3(n)(1), 125 Stat. at 293; *X One, Inc. v. Uber Techs., Inc.*, No.  
16-CV-06050-LHK, 2017 WL 3581184, at \*27 n.1 (N.D. Cal. Aug. 18, 2017) (noting that  
pre-AIA § 112 applies to patents that are continuations of applications filed under the pre-AIA  
regime).

1 surrounding claim language. (*See* '496 Patent at 8:22-23 (explaining that the top edge of  
2 the stretch panel “attach[es] to the body at a top location”); *id.* at 8:23-24 (explaining that  
3 the bottom edge of the stretch panel “attach[es] to the body at a bottom location”).)  
4 Moreover, neither side argues that a person of ordinary skill in the art would understand  
5 the claim terms to mean something different than their customary meaning. (*See*  
6 *generally* Pl. Br.; Def. Br.; Pl. Resp.; Def. Resp.) The court thus declines to construe  
7 “top location” and “bottom location.”

8       6.     substantially continuously along either side of the front portion

9           The claim term “substantially continuously along either side of the front portion,”  
10 which appears in claim 1 of each Patent, describes the attachment of the stretch panel to  
11 the front portion of the garment. (*See* '030 Patent at 8:27-30; '496 Patent at 8:25-27.)  
12 Specifically, claim 1 of the '030 Patent discloses “a stretch panel attached to the body  
13 inside the front portion, the stretch panel comprising . . . side edges attached to the body  
14 at side seams extending substantially continuously along either side of the front portion  
15 from the first seam to the waistband seam . . . .” ('030 Patent at 8:23-30.) Similarly,  
16 claim 1 of the '496 Patent discloses “a stretch panel attached to the body inside the front  
17 portion, the stretch panel comprising . . . side edges attached to the body at side seams  
18 extending substantially continuously along either side of the front portion . . . .” ('496  
19 Patent at 8:20-28.) The claim term does not appear in the Patents’ specification.

20           The parties propose the following constructions of the claim term “substantially  
21 continuously along either side of the front portion”:

22 //

1       **Plaintiffs' Proposed Construction:** Plain and ordinary meaning. Alternatively:  
2       “each side seam attaches one side edge of the stretch panel to the inside of the front  
3       portion of the garment’s body.”

4       **Defendants' Proposed Construction:** “largely, but not necessarily wholly,  
5       uninterrupted along the entire length of each side of the front portion.”

6           The parties’ dispute centers on Defendants’ position that the side seams attaching  
7       the stretch panel to the front portion must extend “along the *entire length* of each side of  
8       the front portion.” (Def. Br. at 11 (emphasis added).) Plaintiffs argue that Defendants’  
9       proposed construction is erroneous because it is inconsistent with the claim language of  
10      the ’496 Patent, which requires only that the stretch panel attach at a top and bottom  
11      location—not the waistband seam and the first seam and, by extension, “not all the way  
12      up and down the front portion.” (Pl. Br. at 16.) Defendants, for their part, assert that the  
13      prosecution history of the ’030 Patent requires the court to construe the claim term to  
14      reflect that the side seams run along the full length of the front portion. (Def. Br. at  
15      11-12; *see also* Def. Resp. at 17.)

16           Defendants’ proposed construction is facially inconsistent with the claim language  
17       of the ’496 Patent. As discussed above, the ’496 Patent claims a stretch panel with a top  
18       edge attached to a “top location,” rather than the waistband seam, and a bottom edge  
19       attached to a “bottom location,” as opposed to the first seam. *See supra* § III.B.4-5. The  
20      court has already rejected Defendants’ proposal to construe “top location” and “bottom  
21      location” as synonymous with “waistband seam” and “first seam,” respectively, and  
22      found that, for claim construction purposes, Plaintiffs are entitled to the full scope of

1 those claim terms. *See id.* The '496 Patent thus covers an undergarment in which the  
2 stretch panel attaches to the body of the garment at a point below the waistband seam and  
3 above the first seam—and, accordingly, the seams along the sides of the stretch panel do  
4 not run the “entire length” of the front portion. (*See* '496 Patent at 8:20-27.) Defendants’  
5 proposed construction of the “substantially continuously” claim term would exclude such  
6 embodiments.

7 Defendants make much of the prosecution history of the '030 Patent. (*See* Def.  
8 Br. at 11-13.) During the prosecution of the application that issued as the '030 Patent, the  
9 PTO examiner rejected claim 1 as unpatentable over U.S. Patent No. 2,235,849 (“Reis”).  
10 (Jt. Cl. Chart, Ex. 4 at 8-9.) In a subsequent interview with the applicant, the examiner  
11 suggested that the applicant “possibly include language that defined the seam structure of  
12 the stretch panel to the outer pouch such that there is no opening on the outermost layer.”  
13 (*Id.* at 43.) The applicant then amended claim 1 to recite that the side edges of the stretch  
14 panel are “attached to the body at side seams extending substantially continuously along  
15 either side of the front portion from the first seam to the waistband.” (*Id.* at 24.) The  
16 applicant explained that this amendment “distinguishes the Reis references[,] which  
17 require non-continuous seams to provide a fly.” (*Id.* at 30.) This amended language was  
18 present in claim 1 of the application that issued as the '496 Patent. (Jt. Cl. Chart, Ex. 6 at  
19 14.) The applicant subsequently amended the claims in response to a statutory double  
20 patenting rejection over the '030 Patent, deleting “from the first seam to the waistband  
21 seam” after the “substantially continuously” term in claim 1. (*Id.* at 36.)

22 //

1 Defendants argue that the prosecution history of the '030 Patent applies with equal  
2 force to the '496 Patent. (Def. Br. at 12.) According to Defendants, “[i]n the '030  
3 Patent’s prosecution, the ‘substantially continuously’ term was necessary to overcome  
4 prior art references with ‘non-continuous side seams to provide a fly,’” including Reis.  
5 (*Id.*) Defendants thus assert that, although the “substantially continuously” claim term in  
6 the '496 Patent does not include the phrase “from the first seam to the waistband seam,”  
7 it nevertheless carries the same meaning as the “substantially continuously” claim term in  
8 the '030 Patent. (*Id.* at 12-13.)

9 Defendants’ logic is unavailing. Defendants correctly note that, “[w]hen multiple  
10 patents derive from the same initial application, the prosecution history regarding a claim  
11 limitation in any patent that has issued applies with equal force to subsequently issued  
12 patents that contain the same claim limitation.” (*Id.* (quoting *Elkay Mfg. Co. v. EBCO*  
13 *Mfg. Co.*, 192 F.3d 973, 980 (Fed. Cir. 1999)).) Here, however, the limitations disclosed  
14 by claim 1 of the '030 Patent and the '496 Patent are not the same: unlike the '030  
15 Patent, the '496 Patent does not require that the side seams along the stretch panel extend  
16 “from the first seam to the waistband seam.” (*Compare* '030 Patent at 27-30, *with* '496  
17 Patent at 8:25-27.) The court will not read into the '496 Patent a claim limitation that the  
18 Patent was amended to discard. Moreover, the applicant’s original addition of the  
19 “substantially continuously” claim term to the application that issued as the '030 Patent  
20 has little bearing on the dispute between the parties here: whether the side seams on the  
21 stretch panel must extend from the first seam to the waistband seam. The amendment  
22 appears to have been intended to distinguish the Invention from prior art in which the

1 stretch panel was attached by “non-continuous side seams” to create a fly, an issue not  
2 implicated in the construction of this claim term. (*See* Jt. Cl. Chart, Ex. 4 at 30.)

3       The court thus rejects Defendants’ proposed construction as at odds with the claim  
4 language of the ’496 Patent and not required by the cited prosecution history. The court  
5 further agrees with Plaintiffs that the claim term “substantially continuously along either  
6 side of the front portion” carries its plain and ordinary meaning in the context of the  
7 asserted claims. The court therefore declines to construe this claim term.

8       7. gathered from side-to-side and top-to-bottom by the stretch panel

9       The claim term “gathered from side-to-side and top-to-bottom by the stretch  
10 panel” appears in claim 1 of each Patent. (’030 Patent at 8:43-44; ’496 Patent at  
11 8:38-39.) Claim 1 of the ’030 Patent discloses:

12       A male garment comprising: . . . a stretch panel attached to the body inside  
13 the front portion . . . the stretch panel having a length when unstretched  
14 smaller than a length measured along the front portion between the first seam  
15 and the waistband seam and width when unstretched smaller than a width  
16 measured along the front portion between the side seams such that the front  
portion is gathered from side-to-side and top-to-bottom by the stretch panel  
and defines a three-dimensional pouch between the stretch panel and the  
front portion for receiving the wearer’s genitals and holding the wearer’s  
genitals while the garment is being worn.

17       (’030 Patent at 8:17-47.) Claim 1 of the ’496 Patent similarly claims a stretch panel that  
18 works to “gather[]” the front portion “from side-to-side and top-to-bottom,” but refers to  
19 the length and width of the stretch panel with reference to the “top and bottom locations”  
20 rather than the waistband seam and first seam. (’496 Patent at 8:31:43.)

21       The parties propose the following constructions of the claim term “gathered from  
22 side-to-side and top-to-bottom by the stretch panel”:

1           **Plaintiffs' Proposed Construction:** Plain and ordinary meaning. Alternatively:  
2       “the front portion of the garment’s body is drawn up both horizontally and vertically  
3       through attachment to the stretch panel, creating a concave space between the stretch  
4       panel and the front portion of garment’s body capable of receiving the wearer’s genitals  
5       when the garment is worn.”

6           **Defendants' Proposed Construction:** “puckered by the stretch panel along each  
7       of the side, waistband, and first seams.”

8           The court finds that Defendants’ proposed construction is problematic for two  
9       reasons. First, the word “puckered” or variations thereof never appear in the claim  
10      language or specification and, at best, is unhelpful to the jury. (*See generally* ’030  
11      Patent; ’496 Patent.) Second, Defendants’ construction assumes that the stretch panel  
12      necessarily extends from the waistband seam to the first seam. (*See* Def. Br. at 14-16.)  
13      But as the court has emphasized, the ’496 Patent permits the stretch panel to run from a  
14      top location (not necessarily the waistband seam) to a bottom location (not necessarily  
15      the first seam). Defendants’ proposed construction would vitiate that difference between  
16      the scope of the ’030 Patent’s and the ’496 Patent’s claims. The court thus rejects  
17      Defendants’ proposed construction.

18           The court further finds that the claim term “gathered from side-to-side and  
19      top-to-bottom by the stretch panel” is clear on its face. The claim language and  
20      specification demonstrate that the claim term “gather[]” carries its plain and ordinary  
21      meaning, and no intrinsic or extrinsic evidence suggests that a person of ordinary skill in  
22      the art would define the term otherwise. For instance, the specification repeatedly

1 describes the stretch panel as gathering the edges of the front portion to create the pouch  
2 in a way consistent with the everyday meaning of “gather.” (*See, e.g.*, ’030 Patent at  
3 4:22-24 (“The two-way elasticity of stretch panel 22 helps to gather the material of front  
4 portion 18 of body 14 to increase the volume of pouch 20.”) (referring to Figure 7); *id.*  
5 6:13-18 (“After assembly, stretch panel 22 can contract. This gathers the material of  
6 front portion 18 and helps to form pouch 20 to have a three-dimensional volume open to  
7 receive the wearer’s genitalia . . .”.) The court thus declines to construe “gathered from  
8 side-to-side and top-to-bottom by the stretch panel.”

9       8. asymmetrical stretch characteristics

10       The claim term “asymmetrical stretch characteristics” appears in claim 2 of each  
11 Patent. Claim 2 discloses “a garment according to claim 1 wherein the stretch panel has  
12 asymmetrical stretch characteristics such that the stretch panel stretches more easily in a  
13 direction parallel to the waistband and less easily in a direction at right angles to the  
14 waistband.” (’030 Patent at 8:48-52; *see also* ’496 Patent at 8:44-48 (featuring identical  
15 claim language).)

16       The parties propose the following constructions of the claim term “asymmetrical  
17 stretch characteristics”:

18       **Plaintiffs’ Proposed Construction:** “the amount of stretch of the fabric produced  
19 when force is applied in one direction differs from the amount of stretch produced when  
20 the same amount of force is applied to the fabric in a different direction.”

21       **Defendants’ Proposed Construction:** Indefinite.  
22

At the outset, the parties agree that the specification expressly defines “asymmetrical stretch.” (*See* Tr. at 45:21-23, 47:23-48:3.) Specifically, the specification provides:

In some embodiments, the material of stretch panel 22 has asymmetrical stretch (i.e. the coefficient of elasticity of the material has a first value in a first direction in the plane of the material and a second value different from the first value in a second direction at right angles to the first direction in the plane of the material). The material may be oriented [such] that it is easier to stretch the material of stretch panel 22 in a direction parallel to waistband 12 than it is to stretch the material in a direction perpendicular to waistband 12.

(‘030 Patent at 5:8-16; *see also* ‘496 Patent at 5:6-12.)

Notwithstanding this definition, Defendants argue that claim 2 of each Patent is indefinite. (Def. Br. at 16-18.) Defendants emphasize that, although the specification defines “asymmetrical stretch” with reference to the material that comprises the stretch panel, claim 2 of the Patents covers a garment wherein the stretch panel itself has asymmetrical stretch characteristics. (Def. Br. at 17.) According to Defendants, “[o]ne of ordinary skill in the art cannot discern with reasonable certainty whether the ‘asymmetrical stretch characteristics’ of claim 2 are characteristics of (1) the fabric comprising the stretch panel prior to being sewn into the garment . . . , or (2) the claimed stretch panel, after the fabric is sewn in place.” (*Id.* at 16 (emphasis omitted).)

1       Under 35 U.S.C. § 112(2),<sup>10</sup> a patent specification must “conclude with one or  
2 more claims particularly pointing out and distinctly claiming the subject matter which the  
3 applicant regards as [the] invention.” 35 U.S.C. § 112(2). “[A] patent is invalid for  
4 indefiniteness if its claims, read in light of the specification delineating the patent, and the  
5 prosecution history, fail to inform, with reasonable certainty, those skilled in the art about  
6 the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901  
7 (2014). This standard requires that “a patent . . . be precise enough to afford clear notice  
8 of what is claimed, . . . while recognizing that absolute precision is unattainable.” *Id.* at  
9 909-10. Further, “[a] patent is presumed valid under 35 U.S.C. § 282 and, ‘consistent  
10 with that principal, a [fact finder is] instructed to evaluate . . . whether an invalidity  
11 defense has been proved by clear and convincing evidence.’” *Biosig Instruments, Inc. v.*  
12 *Nautilus, Inc.*, 783 F.3d 1374, 1377 (Fed. Cir. 2015) (citation omitted) (alteration in  
13 *Biosig*).

14       As a threshold matter, the court considers whether it must reach Defendants’  
15 indefiniteness arguments at the claim construction phase. The Federal Circuit has  
16 emphasized that indefiniteness is “inextricably intertwined with claim construction.”  
17 *Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1379 (Fed. Cir. 1999); *see also*  
18 *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008) (“Indefiniteness is a  
19 matter of claim construction, and the same principles that generally govern claim  
20 construction are applicable to determining whether allegedly indefinite claim language is

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22       

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<sup>10</sup> The court applies pre-AIA § 112(2). *See supra* § III.B.4-5 n.10.

1 subject to construction.”). Where a claim cannot be construed to satisfy 35 U.S.C.  
2 § 112(2), a court may find the term indefinite during claim construction, even in advance  
3 of a separate summary judgment motion. *Int'l Test Sols., Inc. v. Mipox Int'l Corp.*, No.  
4 16-CV-00791-RS, 2017 WL 1367975, at \*3 (N.D. Cal. Apr. 10, 2017) (citing *Praxair*,  
5 543 F.3d at 1319). As one district court has noted, however, “the Federal Circuit’s  
6 statements that indefiniteness is intertwined with claim construction mean only that the  
7 [c]ourt must attempt to determine what a claim means before it can determine whether  
8 the claim is invalid for indefiniteness, and not that the [c]ourt must determine  
9 indefiniteness during the claim construction proceedings.” *ASM Am., Inc. v. Genus, Inc.*,  
10 No. C-01-2190-EDL, 2002 WL 1892200, at \*15 (N.D. Cal. Aug. 15, 2002), *amended sub  
nom. ASM Am., Inc. v. Genus, Inc.*, No. C-01-2190 EDL, 2003 WL 21033555 (N.D. Cal.  
12 Jan. 10, 2003), *aff'd sub nom. ASM Am., Inc. v. Genus, Inc.*, 401 F.3d 1340 (Fed. Cir.  
13 2005).

14 Indeed, district courts frequently decline to rule on indefiniteness at the *Markman*  
15 stage. *See, e.g., Advanced Mrico Devices, Inc. v. LG Elecs., Inc.*, No. 14-cv-01012-SI,  
16 2017 WL 1383271, at \*20 (N.D. Cal. Apr. 18, 2017) (collecting cases); *Intergraph*  
17 *Hardware Techs. Co. v. Toshiba Corp.*, 508 F. Supp. 2d 752, 773 n.3 (N.D. Cal. 2007)  
18 (“Th[e] indefiniteness argument is inappropriate at the claim construction stage.”). Such  
19 reticence makes sense: “well-settled principles,” including the “high burden of proof on  
20 a party challenging the patent based on indefiniteness,” disfavor ruling on indefiniteness  
21 during claim construction. *See CSB-Sys. Int'l Inc. v. SAP Am., Inc.*, No. 10-2156, 2011  
22 WL 3240838, at \*17 (E.D. Penn. July 28, 2011); *see also Waddington N. Am., Inc. v.*

1      | *Sabert Corp.*, No. 09-4883 (GEB), 2010 WL 4363137, at \*3 (D.N.J. Oct. 27, 2010)  
2      | (“[P]ractical considerations . . . militate against determining indefiniteness prior to the  
3      | end of fact or expert discovery.”). “This is especially so if ‘the claim language itself is  
4      | amenable to construction but is alleged to be indefinite as applied.’” *3-D Matrix, Inc. v.*  
5      | *Menicon Co. Ltd.*, No. 14-cv-10205-IT, 2016 WL 111410, at \*13 (D. Mass. Jan. 11,  
6      | 2016) (quoting *Momenta Pharm., Inc. v. Amphastar Pharm, Inc.*, 887 F. Supp. 2d 303,  
7      | 313 (D. Mass. 2012)).

8                  The court declines to reach Defendants’ indefiniteness arguments at this time.  
9                  Defendants’ indefiniteness challenge does not center on the meaning of the words  
10                 “asymmetrical stretch characteristics”; rather, Defendants allege that the claim language  
11                 is indefinite as applied, because, in evaluating infringement, a person of ordinary skill in  
12                 the art would not know whether to test the material used to make the stretch panel prior to  
13                 being sewn into the garment or the stretch panel after assembly. (Def. Br. at 16-18); *see also*  
14                 *3-D Matrix*, 2016 WL 111410, at \*13. Put otherwise, Defendants’ indefiniteness  
15                 arguments venture far beyond the meaning of the claim term and do not bear on whether  
16                 the claim term itself is amenable to construction. Moreover, Defendants provide no  
17                 expert testimony that would support a finding of indefiniteness, relying exclusively on  
18                 attorney argument. (*See generally* Def. Br. at 16-18; Def. Resp. at 20-22.) The court will  
19                 be better equipped to assess indefiniteness on a more complete record. *See Cacace v.*  
20                 *Meyer Mktg. (Macau Commercial Offshore) Co., Ltd.*, 812 F. Supp. 2d 547, 560  
21                 (S.D.N.Y. 2011) (rejecting an indefiniteness challenge where the party “offer[ed] nothing  
22                 more than attorney argument”); (*see also* Sched. Order (Dkt. # 22) at 2 (showing that

1 expert witness reports are not due until August 30, 2019, and fact discovery closes on  
2 October 18, 2019.) The court therefore construes the claim term “asymmetrical stretch  
3 characteristics” without prejudice to Defendants re-raising their indefiniteness challenge  
4 on summary judgment.

5 Neither party directs the court to prosecution history or extrinsic evidence bearing  
6 on the meaning of “asymmetrical stretch characteristics” (*see generally* Pl. Br. at 18-20;  
7 Def. Br. at 16-18), and the court finds that the term is susceptible to construction based  
8 on the surrounding claim language and the specification. As claim 2 of each patent  
9 explains, a stretch panel has asymmetrical stretch characteristics when it “stretches more  
10 easily in a direction parallel to the waistband and less easily in a direction at right angles  
11 to the waistband.” ('030 Patent at 8:48-52; *see also* '496 Patent at 8:44-48.) The  
12 specification describes the same concept with reference to differing “coefficient[s] of  
13 elasticity”: in brief, the specification discloses that a material has asymmetrical stretch  
14 characteristics when it stretches more easily in one direction than it does in the direction  
15 “at right angles to the first direction.” (*See* '030 Patent at 5:8-13; *see also* '496 Patent at  
16 5:4-9.)

17 Given these disclosures, the court construes “asymmetrical stretch characteristics”  
18 as “a property wherein the degree of stretch produced when force is applied in one  
19 direction differs from the degree of stretch produced when the same amount of force is  
20 applied in a direction at right angles to the first direction.” This construction largely  
21 tracks Plaintiffs’ proposed construction but omits reference to “the fabric,” as that phrase  
22 appears in Plaintiffs’ proposal. (*See* Pl. Br. at 18.) That phrase only muddles the scope

1 of the claim term, which refers to the “stretch panel” rather than the fabric comprising the  
2 stretch panel. (*See* ’030 Patent at 8:48-49; ’496 Patent at 8:44-45.)

3       9. rectangular

4       The claim term “rectangular” appears in dependent claim 3 of each Patent, which  
5 discloses “[a] garment according to claim 1 wherein the stretch panel is rectangular . . . .”  
6 (’030 Patent at 8:53-54; ’496 Patent at 8:49-50.)

7       The parties propose the following constructions of the claim term “rectangular”:

8       **Plaintiffs’ Proposed Construction:** “an exterior outline with four corners and  
9 with one opposing pair of edges significantly longer than the other opposing pair of  
10 edges.”

11       **Defendants’ Proposed Construction:** “the shape of a rectangle.”

12       The parties dispute whether claim 3 of the Patents covers only stretch panels that  
13 are perfectly rectangular—that is, having opposing sides of equal lengths and four right  
14 angles—or encompasses stretch panels that are approximately rectangular. (*See* Pl. Br. at  
15 20-21; Def. Br. at 18-20.) Defendants insist that the claim language is directed to a  
16 precisely rectangular stretch panel (Def. Br. at 18), whereas Plaintiffs argue that the  
17 stretch panel may be “a shape reminiscent of a rectangle” (Pl. Br. at 20). Both parties  
18 emphasize that the specification discloses a preferred embodiment—undershorts—in  
19 which the stretch panel is “generally rectangular,” as opposed to the “rectangular” stretch  
20 panel covered by claim 3. (*See* ’030 Patent at 4:44-45; ’496 Patent at 4:40-41; *see also*  
21 Pl. Br. at 20-21; Def. Br. at 18-20.)

22

1        In Defendants' view, the "narrower" claim language supersedes the specification's  
2 disclosure of a stretch panel that is "generally rectangular." (Def. Br. at 19.) The court is  
3 not convinced. The Patents do not claim a stretch panel that is a rectangle but rather a  
4 stretch panel that is, more broadly, "rectangular," a word that leaves ambiguous the  
5 degree of mathematical precision required. (*See* '030 Patent at 8:53-54; '496 Patent at  
6 8:49-50.) The Patents' specification—"the single best guide to the meaning of a disputed  
7 term," *see Vitronics*, 90 F.3d at 1582—helps resolve this ambiguity, indicating that the  
8 claim term is not limited to geometric rectangles. In describing the "generally  
9 rectangular" stretch panel of the preferred embodiment, the specification explains that the  
10 top and bottom edges of the panel are "equal to within +10% or +15%," and the seams at  
11 the sides of the stretch panel "are generally straight and generally perpendicular to [the]  
12 waistband . . ." ('030 Patent at 4:46-49; *see also id.* at Fig. 16 (showing a stretch panel,  
13 pre-assembly, that is not a precise rectangle); '496 Patent at 4:40-43; *id.* at Fig. 9.) Read  
14 together, the claim language and specification demonstrate that the stretch panel may be  
15 "rectangular" even if it is not a geometric rectangle. To construe the claim term  
16 otherwise would read out the preferred embodiment in which the stretch panel is  
17 generally rectangular, an outcome the court should avoid. *See Vitronics*, 90 F.3d at 1583.

18        The district court's decision in *Denneroll Holdings Pty Ltd. v. Chirodesign Grp.,*  
19 *LLC*, No. 4:15-CV-740, 2016 WL 705207, at \*3 (S.D. Tex. Feb. 23, 2016), provides  
20 persuasive support for this conclusion. In that case, the court was tasked with construing  
21 the claim term "orthogonal." *Id.* at \*3. Although the patent at issue merely claimed an  
22 "orthogonal" structure, the specification indicated that a key part of the structure was

1 “substantially” orthogonal. *Id.* The court rejected the defendants’ argument that, because  
2 the claim term itself did not contain the modifier “substantially,” the claim required a  
3 precisely, rather than a “substantially,” orthogonal structure. *Id.* at \*4. In so doing, the  
4 court reasoned that “the language of the specification expressly ties the adverb  
5 ‘substantially’ to the term ‘orthogonal.’” *Id.* The court further emphasized that the  
6 defendants’ mathematically exact construction would read out the patent’s preferred  
7 embodiment. *Id.* The analogous circumstances before this court compel a similar  
8 conclusion.

9         The court agrees with Defendants, however, that Plaintiffs’ proposed construction  
10 is deficient. (*See* Def. Br. at 18-20.) Plaintiffs’ proposed construction could conceivably  
11 encompass shapes bearing little resemblance to a rectangle. (*See* Pl. Br. at 20; Def. Resp.  
12 at 20.) Moreover, the court finds no support in the intrinsic evidence for the proposed  
13 limitation that would require one opposing pair of edges to be “significantly longer” than  
14 the other.

15         Instead, the court construes “rectangular” as “having a shape with four corners  
16 wherein the lengths of the top and bottom edges are approximately equal to each other  
17 and the lengths of the left and right edges are approximately equal to each other.” This  
18 construction is consistent with both the claim term’s plain and ordinary meaning and the  
19 specification’s disclosure of a preferred embodiment in which the stretch panel is  
20 “generally rectangular.”

21 //

22 //

1       10. a dart seam stitched along a bottom portion of the pouch

2           The claim term “a dart seam stitched along a bottom portion of the pouch” appears  
3 in each Patent’s dependent claim 15. That claim covers “[a] garment according to claim  
4 wherein the pouch comprises a dart seam stitched along a bottom portion of the pouch  
5 and substantially centrally to provide extra volume in front of and underneath the genitals  
6 of a wearer.” (’030 Patent at 9:23-26; ’496 Patent at 9:24-27.)

7           The parties propose the following constructions of the claim term “a dart seam  
8 stitched along a bottom portion of the pouch”:

9           **Plaintiffs’ Proposed Construction:** “a shaping seam where material has been  
10 folded or removed to provide three-dimensional shaping or space, where the seam is  
11 stitched along a bottom portion of the pouch.”

12           **Defendants’ Proposed Construction:** “an additional seam present along the  
13 bottom portion of the front portion but not along the top portion of the front portion.”

14           The parties disagree about two issues related to the construction of “dart seam  
15 stitched along a bottom portion of a pouch.” First, the parties dispute whether the claim  
16 term should be construed to permit the dart seam to extend to the top portion of the pouch  
17 in addition to the bottom portion of the pouch. (*See* Def. Br. at 20-21; Pl. Resp. at  
18 10-11.) Second, the parties dispute whether the court should define “dart seam” as  
19 requiring the folding over or removal of fabric to create volume in the pouch. (*See* Pl. Br.  
20 at 22-23; Tr. at 59:14-18.)

21           The first issue is easily resolved. Defendants argue that, “[g]iven the anatomy of  
22 male genitalia, the only portion of the pouch that requires extra volume when the

1 undergarment is being worn is the bottom portion of the pouch.” (Def. Br. at 20.)  
2 Accordingly, in Defendants’ view, the court should construe the claim term to specify  
3 that the dart seam may not extend “along the top portion of the front portion.” (*Id.*) That  
4 construction is inconsistent with the claim language. Claim 15 provides that “the pouch  
5 comprises a dart seam stitched along a bottom portion of the pouch.” (’030 Patent at  
6 9:23-24.) As Plaintiffs emphasize, “comprises” is a term of art. (Pl. Br. at 24 (citing  
7 *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1344-45 (Fed. Cir. 2003).)  
8 The word “comprises” is used in claim language to “mean[] that the named elements are  
9 essential, but other elements may be added and still form a construct within the scope of  
10 the claim.” *Amgen*, 314 F.3d at 1345. Here, because the pouch “comprises” a dart seam  
11 stitched along a bottom portion of the pouch, the pouch could conceivably include a dart  
12 seam that extends to part of the top portion of the pouch—even though that feature is not  
13 seen in the preferred embodiment described in the specification. *See id.* The court thus  
14 rejects Defendants’ proposal to limit the dart seam to the bottom portion of the pouch  
15 alone.<sup>11</sup>

16 As to the second issue, Plaintiffs argue that the court must construe the claim term  
17 to reflect that a “dart seam” is a “shaping seam where material is removed or folded  
18 over.” (Pl. Br. at 22 (emphasis omitted).) That construction finds no support in the claim  
19 language or specification. The claim language merely provides that the purpose of the  
20

21 \_\_\_\_\_  
22 <sup>11</sup> The court notes that, at the *Markman* hearing, Defendants’ counsel conceded that this proposed limitation is better addressed as a “non-infringement argument,” rather than a claim construction issue. (Tr. at 60:17-22.)

1      dart seam is to “provide extra volume in front of and underneath the genitals of the  
2      wearer”; it does not require that the seam be made through a specific process. (*See* ’030  
3      Patent at 9:23-26; *see also* ’496 Patent at 9:24-27.) Nor does the specification suggest  
4      that the dart seam necessarily arises from the removal or folding over of fabric. Rather, it  
5      simply states that the dart seam shapes the front portion to provide volume in the pouch.  
6      (*See, e.g.*, ’030 Patent at 2:37-46; *see also* ’496 Patent at 2:38-42.)

7            Moreover, the extrinsic evidence Plaintiffs cite does not confirm that a person of  
8      ordinary skill in the art of the Patents would understand “dart seam” to necessarily  
9      require the removal or folding over of fabric. Plaintiffs rely on two sources that  
10     ostensibly discuss dart seams: (1) a 2006 book by Lori A. Knowles called *The Practical*  
11     *Guide to Patternmaking for Fashion Designers: Menswear* (“the Knowles excerpt”), and  
12     (2) a 1987 book by Helen Joseph Armstrong called *Patternmaking for Fashion Design*  
13     (“the Armstrong excerpt”). (*See* Pl. Br. at 23; Jt. Cl. Chart, Ex. 48 (Dkt. # 47-50)  
14     (“Knowles”) at 199; Jt. Cl. Chart, Ex. 49 (Dkt. # 47-51) (“Armstrong”) at 144-75.) The  
15     Armstrong excerpt focuses exclusively on women’s dresses. (*See generally* Armstrong.)  
16     The court declines to assume that a person of ordinary skill in the art of the Patents would  
17     find the Armstrong excerpt relevant to the meaning of the Patents’ claims. In any event,  
18     Plaintiffs point to no specific portion of the Armstrong excerpt that supports the notion  
19     that, as a rule, a dart seam involves the removal or folding over of fabric.<sup>12</sup> (*See* Pl. Br. at  
20     )

21           

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<sup>12</sup> The Armstrong excerpt consists of 65 pages. (*See generally* Armstrong.) The court  
22     declines to comb through Plaintiffs’ exhibit in search of support for Plaintiffs’ proposed  
   construction. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)

1     23.) Similarly, the Knowles excerpt, which consists of a single page from a glossary,  
2     does not define “dart seam.” (*See generally* Knowles.) Rather, it refers to “darts”  
3     generally as “[a] stitched fold of fabric in a garment that shapes the fabric over the curves  
4     of the body.” (*Id.* at 199.) That definition, although not inconsistent with the  
5     specification, adds little to the court’s understanding of how a person of ordinary skill in  
6     the art would understand the term “dart seam” as used in the context of the Patents. Put  
7     otherwise, Plaintiffs’ extrinsic evidence is insufficient to establish that a person of  
8     ordinary skill in the art of the Patents would understand “dart seam” to necessarily  
9     require the removal or folding over of fabric in the garment’s pouch.

10           Having rejected both parties’ proposed definitions of the claim term, the court  
11     looks to the intrinsic evidence. In view of the claim language and specification, the court  
12     construes “a dart seam stitched along a bottom portion of the pouch” as “a shaping seam  
13     stitched along a bottom portion of the pouch.” The surrounding claim language renders a  
14     more detailed definition redundant; it makes clear that the dart seam works to “provide  
15     extra volume in front of and underneath the genitals of a wearer.” (’030 Patent at  
16     9:23-26; ’496 Patent at 9:24-27.) Additionally, the specification supports construing “a  
17     dart seam” as “a shaping seam.” For instance, the specification indicates that the dart  
18     seam plays a “shaping” role, working to make the front portion “non-flat”—*i.e.*,  
19     three-dimensional—and helping form the outer shell of the pouch. (*See* ’030 Patent at  
20     6:35-38; *see also* ’496 Patent at 31-34.) Finally, the court finds that the limitation

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(“[J]udges are not like pigs, hunting for truffles buried in briefs.”) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

1 “stitched along a bottom portion of a pouch” speaks for itself and does not require  
2 construction.

## IV. CONCLUSION

For the foregoing reasons, the court rules as follows:

- (1) The court DECLINES TO CONSTRUE “front portion”;
  - (2) The court DECLINES TO CONSTRUE “stretch panel”;
  - (3) The court DECLINES TO CONSTRUE “crotch panel”;
  - (4) The court DECLINES TO CONSTRUE “top location”;
  - (5) The court DECLINES TO CONSTRUE “bottom location”;
  - (6) The court DECLINES TO CONSTRUE “substantially continuously along either side of the front portion”;
  - (7) The court DECLINES TO CONSTRUE “gathered from side-to-side and top-to-bottom by the stretch panel”;
  - (8) The court CONSTRUES “asymmetrical stretch characteristics” as “a property wherein the degree of stretch produced when force is applied in one direction differs from the degree of stretch produced when the same amount of force is applied in a direction at right angles to the first direction”;
  - (9) The court CONSTRUES “rectangular” as “having a shape with four corners wherein the lengths of the top and bottom edges are approximately equal to each other and the lengths of the left and right edges are approximately equal to each other”; and

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1                   (10) The court CONSTRUES “a dart seam stitched along a bottom portion of the  
2                   pouch” as “a shaping seam stitched along a bottom portion of the pouch.”

3                   Dated this 30th day of July, 2019.

4  
5                     
6                   The Honorable James L. Robart  
7                   U.S. District Court Judge